

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 20,256  
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Appeal of )

The petitioner appeals a decision by the Department of Aging and Independent Living (DAIL) denying payment for an assistive device under the Choices for Care program. The issue is whether payment for an Electric Leg Bag Emptier is covered as an assistive device. The proposed findings of fact are based upon affidavits, exhibits, and testimony.

1. The petitioner is a forty-one year old quadriplegic who receives services from the Choices for Care program administered by DAIL. The petitioner became a paraplegic as a result of a fall when he was a teenager. The petitioner is under medical care for a C3-C4 injury with quadriplegia and secondary neurogenic bladder.

2. The petitioner values his independence and has been able to live alone in an accessible apartment with the help of the services he receives under the Choices for Care

program.<sup>1</sup> The petitioner receives forty-one hours per week of personal care home health in addition to two hours per day of companion care. During the daytime, he is alone most days for four to five hours in the afternoon and for a stretch during the evening. According to petitioner, the weekday schedule for his attendants is four hours in the morning, two to three hours in the late afternoon, and one hour prior to going to bed. The weekend hours are a bit less.

3. Proper toileting care is very important to maintaining petitioner's health and his independence. The petitioner experiences bladder problems similar to other quadriplegics. Petitioner has recurring bladder infections. Also, petitioner has a white mass of abnormal cells on his kidney which is monitored by his doctors. Petitioner follows his doctors' advice to drink at least four liters of liquid daily to keep his bladder flushed.

4. Petitioner has no control over his bladder. There is a continuous flow of urine into his bag. The daytime bag has a capacity of 500 cc; the night bag has a capacity of 2000 cc. During the day, petitioner's bag needs to be emptied approximately every two hours. If the bag is

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<sup>1</sup> Prior to the creation of the Choices for Care program, petitioner received services under the Home and Community-Based Services Waiver administered by DAIL.

not emptied, the urine will back up causing the petitioner to have headaches, sweat, shake, and go into dysflexia. In addition, if the bag is not emptied and urine backs up, there is the possibility of urine leaking onto the petitioner with the potential of skin breakdown and infections.

5. Petitioner needs total assistance with his toileting. He is not able to change the bag, clean the bag or his catheter, clean himself, or do other parts of his toileting. The only part that petitioner can do is operate the Electric Leg Bag Emptier (ELBE) which is a switch on his wheelchair that he can engage. Using the ELBE causes the urine bag to empty during the daily stretches when he is between attendants.

6. Petitioner has had an ELBE for over twelve years.<sup>2</sup> Petitioner finds that an ELBE will normally last about two years. He has had the present ELBE for about four years.

7. Without the ELBE, petitioner would need to have additional time scheduled for attendants under the Choices for Care program because he would not be able to stay alone for stretches of three to four hours during the day since his

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<sup>2</sup> In the past, petitioner was able to obtain funding from the Area Agency on Aging or the Visiting Nurse Association.

bag would need to be emptied approximately every two hours to prevent leaking or potential medical problems.

8. The petitioner applied to DAIL to cover the cost of an ELBE replacement at \$275 plus shipping, a leg bag valve for \$25, and a replacement Uricare durable leg bag for \$50 (totaling \$350 plus shipping).

9. Under the current Choices for Care plan, petitioner receives forty minutes per day for toileting.

10. DAIL used a two part determination pursuant to their regulations, *infra*. They first determined that the petitioner's request would not be funded through Medicare, Medicaid or private insurance. They then denied the petitioner's request finding that if they replaced the ELBE, the petitioner would not be more independent and his toileting needs would not be reduced.

11. As part of the Department's review, Paula Hartshorn, Choices for Care Long-term Care Clinical Director, and Megan Tierney-Ward, Medicaid Waiver Supervisor, reviewed petitioner's written request and the petitioner's personal care worksheets. The August 29, 2005 worksheet places

petitioner at the highest level of need for toileting where the attendants assist less than six times per day.<sup>3</sup>

12. Anya Martinez, petitioner's case manager through Champlain Valley Area on Agency (CVAA) testified that petitioner will need additional time from personal care attendants if petitioner does not have the ELBE since attendants will need to see petitioner on a more frequent basis to take care of his toileting needs. Her testimony is in accord with documentation from (1) Patricia Donehower, director, Adult Home Care, Visiting Nurse Association; (2) Dr. Robert Luebbers, petitioner's primary physician; and (3) Nicki Day, prior CVAA case manager.

13. There was conflicting testimony from the witnesses for petitioner and DAIL whether the personal care worksheets factored in the effect of the ELBE; in part, because the worksheets do not adequately ask whether assistive devices are factored into the time estimates. The ELBE was first referred to in 1999 on forms to DAIL. Not all the forms reference the ELBE; however, the petitioner has had the ELBE throughout the past twelve years. The worksheet is used to support a request for hours based on the person's need. The

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<sup>3</sup> The Department also looks at situations in which the recipient needs toileting assistance six or more times per day; the daily maximum is increased to sixty minutes.

person's need would be based on the person's actual circumstances including their level of need and the time spent by attendants who would factor in the ameliorative impacts of any assistance devices. The worksheets do not demonstrate the need without the ELBE.

ORDER

DAIL's decision is reversed.

REASONS

The Choices for Care program was created to provide individuals with disabilities equal access to home and community based services or nursing home services. *Choices for Care, 1115 Long-Term Care Medicaid Waiver, Part I.* The attendant care program gives individuals the supports they need with Activities of Daily Living and Instrumental Activities of Daily Living. Petitioner has been accorded these supports.

The question is whether petitioner's request for funding for his ELBE should be granted as an assistive device from the Choices for Care program. Under the Choices for Care program, a person can receive up to \$750 in a calendar year for assistive devices. *Choices for Care, Vermont Long-Term*

*Care Medicaid Program Manual (CfC Manual), Section IV.6(E)(1).*

Assistive Devices are defined as follows:

An "Assistive Device" is defined as an item, whether acquired commercially or off the shelf, which is used to increase, maintain, or improve functional capabilities.

*CfC Manual, Section IV.6(A).*

Use of the ELBE maintains petitioner's functional capabilities and should be considered an assistive device.

DAIL will only consider assistive devices that are not otherwise covered by a medical insurance program such as Medicare, Medicaid, or private insurance. *CfC Manual, Section IV.6(E)(2).* As part of their review of petitioner's request, DAIL had determined that the ELBE would not be covered by any of these programs.<sup>4</sup>

The ELBE is not listed on either the "approved" or "not approved" lists in the regulations meaning the ELBE must be pre-approved by DAIL. In particular, the pre-authorization regulation states that "[d]eterminations will be made based

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<sup>4</sup> While the within fair hearing has been pending, the question was raised whether the petitioner had also looked into funding through Medicaid. Petitioner then attempted to do so. Although both the Choices for Care program and the Medicaid program are under the roof of the Agency of Human Services, there has been a significant delay in the Departments communicating with each other about this request. It now appears that the effort to have the ELBE paid for by Medicaid has hit a brick wall. A significant amount of time has passed since the petitioner first appealed the denial, and relief is now warranted. If DAIL now believes that Medicaid is the proper source, they can seek reimbursement.

on the individual's unique circumstances. . ." *CfC Manual, Section IV.6(D) (6)* .

Looking at the petitioner's unique circumstances, the petitioner has been able to forge a very independent life through his perseverance and community supports. With the ELBE, petitioner has been able to have his Choices for Care services scheduled so that he has large blocks of time without any attendant services. If the ELBE is not replaced, petitioner will need his bag emptied approximately every two hours necessitating several more daily scheduled services from attendants under the Choices for Care Program so that he can continue to live independently in the community. At the least, petitioner will move to the category of six or more assists daily with toileting with its corresponding increase of time.

Based on petitioner's unique circumstances, his request for payment of assistive devices should be paid. Accordingly, DAIL's decision to deny payment for the ELBE, leg bag valve, and Uricare bag is reversed.

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